PUBLIC PROSECUTOR

v.

TANG KHENG TEONG & ANOR

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABDUK MALEK AHMAD JCA
DENNIS ONG JCA
[CRIMINAL APPEAL NO: P-05-70-94]
31 JULY 1997

CRIMINAL LAW: *Dangerous Drugs Act 1952, ss. 39(B)(1), 39A(2), 12(2) & (3) - Trafficking in heroin - Infirmity in evidence of chemist - Charge amended to one of possession - Whether proper - Whether justified*

CRIMINAL PROCEDURE: *Charge - Reduction of - Trafficking in heroin - Section 39B(1) Dangerous Drugs Act 1952 - Infirmity in evidence of chemist - Failure to state weight of sample taken from each bulk of drug exhibits - Qualitative test showed conclusively that exhibits contained heroin - Whether Court justified in amending charge to one of possession under s. 12(2) of Act*

EVIDENCE: *Expert evidence - Evidence of chemist - Evaluation of - Trafficking in dangerous drugs - Failure of chemist to state weight of sample taken from each bulk of drug exhibits - Whether fatal - Whether omission immaterial when there was no doubt that the exhibits analysed were indeed heroin*

The respondents in this case were charged with trafficking in 1,689.68 grammes of heroin under s. 39B(1) of the Dangerous Drugs Act 1952 ('the Act'). At the close of the case for the prosecution the Court held that although the qualitative analysis as carried out by the chemist showed that the drug exhibits did in fact contain heroin, there was doubt as to the extent to which each bulk of the exhibits was homogenised prior to analysis, such that it was uncertain whether the sample taken from the sample for the gas chromatography test was indeed representative of the bulk. Upon this alleged infirmity, the Court rejected the evidence of the chemist and the preferred charge, in consequence, was amended to one under s. 12(2) and (3) of the Act punishable under s. 39A(2) thereof. The amended charge, as drafted, showed that the amount of heroin which the respondents were alleged to have had in their possession was the same as that specified in the original charge, ie, 1,689.68 grammes. Both respondents pleaded guilty to the amended charge and were accordingly convicted and sentenced.

Dissatisfied, the Public Prosecutor appealed against the decision to amend the charge contending that, on the facts, the learned Judge ought to have called for the defence of both respondents on the original charge. The respondents questioned the propriety of the appeal against the conviction arguing that this was a matter where they had pleaded guilty to an amended charge, wherefore the appeal should only be against sentence as per s. 305 Criminal Procedure Code.

Held:
Per Abdul Malek Ahmad JCA

[1] The learned trial Judge was in error especially when he had specified the same amount of drugs in the amended charge as that appearing in the original charge, and after having concluded that the prosecution's case was overwhelming and that the drug involved, pursuant to the chemical analysis, was heroin.

[2] In the light of the findings of the trial Judge, this Court is mystified by the rejection of the chemist's evidence and consequently could not agree with him that the chemist had not complied with the provisions of the Act in conducting the chemical analysis on the drugs recovered.

[3] The trial Judge ought to have called for the defence of both respondents on the original charge and should dispose the same within three months from that order. Since the second respondent has already completed his imprisonment term, it is directed that the prosecution take action, as regards the order of committal against him, for the purpose of the continued hearing.

[4] Section 305 of the Criminal Procedure Code applies only to proceedings in a Sessions Court and a Magistrate's Court. By s. 50 of the Courts of Judicature 1964, however, the Court of Appeal has jurisdiction to hear and determine any appeal against any decision made by the High Court in the exercise of its original jurisdiction in respect of any criminal matter decided by the Sessions Court and "decision" under s. 3 of the Act includes a judgment, sentence or order. The argument of Counsel for the respondents is totally devoid of merit, as the decision appealed against was actually the reduction of the charge which certainly was an order, which is appealable, and the plea of guilty by both respondents to the reduced charge was only a consequence of that order.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

DADAH BERBAHAYA: *Mengedar heroin - Kelemahan dalam keterangan ahli kimia - Tuduhan dipinda kepada tuduhan memiliki - Samada betul - Samada wajar - Akta Dadah Berbahaya 1952, ss. 39B(1), 39A(2), 12(2) & (3)*

PROSEDUR JENAYAH: *Pertuduhan - Diringankan - Mengedar heroin - Seksyen 39B(1) Akta Dadah Berbahaya 1952 - Kelemahan dalam keterangan ahli kimia - Gagal menyatakan berat contoh yang diambil dari setiap pukal eksibit dadah - Ujian kualitatif menunjukkan dengan muktamadnya bahawa eksibit mengandungi heroin - Samada wajar bagi Mahkamah meminda pertuduhan kepada tuduhan memiliki di bawah s. 12(2) Akta*

KETERANGAN: *Keterangan ahli kimia - Penilaian - Mengedar dadah berbahaya - Kegagalan ahli kimia menyatakan berat contoh yang diambil dari setiap pukal eksibit dadah - Samada memudaratkan - Samada kegagalan tidak material apabila tidak ada keraguan bahawa eksibit yang dianalisa adalah sebenarnya heroin*

Responden dalam kes ini menghadapi tuduhan mengedar 1,689.68 gram heroin di bawah s. 39B(1) Akta Dadah Berbahaya 1952 ('Akta'). Di akhir kes pendakwaan Mahkamah memutuskan bahawa, walaupun ujian kualitatif seperti yang dibuat oleh ahli kimia menunjukkan bahawa eksibit dadah berkenaan sememangnya mengandungi heroin, terdapat keraguan tentang tahap penjenisan setiap pukal eksibit tersebut sebelum ujian dilakukan, yang berakibat terdapat ketidakpastian samada contoh yang diambil dari contoh untuk ujian 'gas chromatography' adalah sebenarnya mewakili pukal tersebut. Atas kelemahan yang dikatakan ini, Mahkamah telah menolak keterangan ahli kimia, dan pertuduhan yang asal, akibatnya, telah dipinda kepada satu pertuduhan di bawah s. 12(2) & (3) yang boleh dihukum di bawah s. 39A(2) Akta. Pertuduhan yang terpinda, sebagaimana yang dirangka, menunjukkan bahawa jumlah heroin yang dikatakan berada dalam milik responden adalah sama seperti yang tercatat dalam pertuduhan asal, iaitu sebanyak 1,689.68 gram. Kedua-dua responden mengaku bersalah terhadap pertuduhan terpinda dan telah disabit dan dihukum sekadarnya.

Berasa tidak puas hati, Pendakwa Raya merayu terhadap keputusan untuk meminda pertuduhan dengan menghujah bahawa, berdasarkan fakta, Hakim yang bijaksana seharusnya memanggil kedua-dua responden untuk membuat pembelaan atas pertuduhan yang asal. Responden mempersoalkan kewajaran rayuan terhadap sabitan dengan menghujah bahawa ini adalah perkara di mana mereka telah membuat pengakuan bersalah terhadap pertuduhan terpinda, dan oleh sebab itu, rayuan sepatutnya dibuat hanya terhadap hukuman selaras dengan s. 305 Kanun Acara Jenayah.

Diputuskan:
Oleh Abdul Malek Ahmad HMR

[1] Hakim perbicaraan yang bijaksana adalah tersilap terutama bila beliau mencatatkan jumlah dadah yang sama di dalam pertuduhan terpinda seperti yang tercatat dalam pertuduhan asal, dan setelah memutuskan bahawa kes pendakwaan adalah sangat menyakinkan dan bahawa dadah yang terlibat, ekoran dari ujian kimia, adalah heroin.

[2] Mengambil kira pendapat-pendapat Hakim perbicaraan, Mahkamah ini merasa pelik atas penolakan keterangan ahli kimia dan seterusnya tidak bersetuju dengan beliau bahawa ahli kimia tidak mematuhi peruntukan-peruntukan Akta sewaktu menjalankan ujian kimia terhadap dadah berkenaan.

[3] Hakim perbicaraan hendaklah memanggil pembelaan bagi kedua-kedua responden atas pertuduhan asal dan harus menyelesaikan kes tersebut dalam masa tiga bulan dari perintah sedemikian. Oleh kerana responden kedua telah selesai menjalani hukuman penjaranya, ianya diperintahkan bahawa pendakwaan mengambil tindakan, berhubung dengan perintah pemenjaraan terhadapnya, untuk keperluan perbicaraan sambungan.

[4] Seksyen 305 Kanun Prosedur Jenayah hanya terpakai kepada prosiding di Mahkamah Sesyen dan Mahkamah Mejisteret. Bagaimanapun, menurut seksyen 50 Akta Mahkamah Kehakiman 1964, Mahkamah Rayuan mempunyai bidangkuasa untuk mendengar dan memutuskan sebarang rayuan terhadap keputusan-keputusan yang dibuat oleh Mahkamah Tinggi melalui bidangkuasa asalnya terhadap mana-mana perkara jenayah yang diputuskan oleh Mahkamah Sesyen dan "keputusan" dibawah s. 3 Akta termasuklah penghakiman, hukuman atau perintah. Hujah peguam responden adalah tanpa merit, oleh kerana keputusan yang dirayui di sini adalah sebenarnya keputusan meringankan pertuduhan, yang merupakan satu perintah, yang mana boleh dirayui, dan pengakuan salah oleh kedua-dua responden terhadap pertuduhan yang diringankan itu hanyalah akibat dari perintah tersebut.

[Rayuan dibenarkan.]

Cases referred to:
Public Prosecutor v. Ang Soon Huat [1991] 1 MLJ 1 ***(refd)***
Public Prosecutor v. Lam Sam [1991] 3 MLJ 426 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 50
Criminal Procedure Code, ss. 303A, 305
Dangerous Drugs Act 1952, ss. 12(2), (3), 39A(2), 39B(1)

[Appeal from High Court Malaya, Pulau Pinang; Criminal Trial No: 47-1-91]

For the appellant - Zaitun Zawiyah Puteh, DPP
For the respondents - R Rajasingam (Ranjit Singh Dhillon with him); M/s R Rajasingam & Co

JUDGMENT

Abdul Malek Ahmad JCA:

A police party had raided apartment No. 46-11-11 Green Lane Heights, Jalan Besi in Georgetown, Penang at about 6 pm on 30 June l990 after having to break the front wooden door down. The wooden door was behind a metal grilled door which was closed but not locked and the front window louvres were shut. The police had identified themselves when knocking on the front door but upon getting no response had kicked in open. They had, however, heard the sound of things being moved inside when they had earlier knocked. From a hole in the door as a result of the kick, they managed to open the door from inside. Inside, they found both the respondents, who were brothers, one in the living room and one in the kitchen, clad only in their underwear with white powder and orange colouring on the tips of their fingers and feet, in a state of shock.

In the apartment, the raiding party found two light green basins containing orange coloured powder in loose form in the kitchen and a yellow coloured basin containing orange coloured powder being heated on a gas stove at the rear balcony. After arresting the respondents, the police party made a search of the apartment. Prior to the search, the first respondent, now handcuffed, had led the police to the only toilet in the apartment where he pointed upwards with his mouth to the water tank. At the top of the tank was discovered a white and light orange coloured plastic bag inside which were four compressed blocks of a white substance each wrapped separately in plastic and brown paper.

Three packets and six small packets of suspected heroin were found in a pail in the third room and in a drawer of the altar in the living area respectively. All the contents of the exhibits recovered, the swabs taken of the hands and feet of the respondents, and the samples of powder gathered from the floors and from the underwear the respondents were wearing, showed traces of heroin which upon chemical analysis amounted to 1,689.68 grammes of heroin which formed the subject matter of the trafficking charge against them.

At the close of the case for the prosecution, the learned trial Judge amended the charge to one under s. 12(2) and (3) of the Dangerous Drugs Act 1952 (hereinafter 'the Act') punishable under s. 39A(2) of the Act.

The amended charge read as follows:

> That you jointly on 30 June l990 at about 6 pm at apartment 46-11-11 Green Lane Heights, Jalan Besi, in the district of Georgetown, in the state of Penang, did have in your possession a dangerous drug, to wit, 1,689.68 grammes of heroin, to which Part IV of the Dangerous Drugs Act 1952 applies without being authorised to be in possession of such drug or deemed to be so authorised under the said Act or regulations made thereunder and you have thereby committed an offence under sub-ss. (2) and (3) of s. 12 and punishable under sub-s. (2) of s. 39A of the said Act.

Even this, in our view, is not quite correct as sub-s. (3) of s. 12 of the Act is a punishable section and not the commission section.

Both respondents pleaded guilty. The first respondent was sentenced to twelve years imprisonment and to twelve strokes while the second respondent, being a juvenile, to nine years imprisonment and to ten strokes. The jail terms were to run from the date of arrest.

As the learned trial Judge explained in his judgment:

> The evidence of being in possession of the heroin found in the apartment in this case was overwhelming against the two accused persons so as to justify their being called to enter upon their defence. They were surprised by the police party and caught in their underwear, literally with their pants down and off. Swabs taken of their hands and feet showed the presence of heroin. The suspected drugs found in their immediate presence when surprised by the police party as well as those recovered from the toilet and other parts of the apartment showed the same to be heroin. There was no one else in the apartment at the time of the raid and there was an inexorable link between them and the heroin recovered.

However, he appeared to be quite unhappy with the evidence of the chemist. At one point he said:

> In these circumstances, the Court had no doubt that the drug exhibits which were analysed did contain heroin but the question was, how much? Again, the Court had doubts of the extent to which each bulk of the suspected drug exhibits was homogenised before analysis as it was only in re-examination that the chemist said that he also used a blender besides physically shaking the suspected drug exhibits in a plastic bag to "harmonise" them. However, even the use of a blender alone, without more, would not assure homogeneity of

the bulk in the absence of evidence to show that the process adopted had resulted in the bulk achieving a uniform consistency throughout so as to become homogenous.

Bearing the above infirmities in the chemist's evidence in mind, it was open to the Court to even amend the charge to one under s. 12(2) and punishable under s. 12(3) of the Act. However, having regard to the circumstances of the case, the large quantity of suspected drug exhibits seized and the apparent concession of learned Counsel for the accused persons in his submission that they were answerable for an offence but that the charge should be reduced to one of lesser severity from that which they faced under s. 39B of the Act, the Court was of the view that the interests of justice would best be served by reducing the charge to one punishable under s. 39A(2) of the Act, even though it was equally open to the Court to reduce it to one punishable under s. 12(3) of the Act, the Court being unable to arrive at a proper quantification of the heroin based on the evidence of the chemist.

In the present case, the chemist did not only **not** say what was the weight of the sample he took from each bulk, but he did not also say what was the weight of the sample that he took from the sample, for the purpose of carrying out the gas chromatography test which enabled him to determine the quantity of heroin in the bulk. Again, although the chemist referred to arriving at a percentage in general terms, he did not specify what was the percentage of heroin in the sample upon which the test was carried out so as to arrive at the quantity of heroin in the bulk.

He had then cited the Singapore case of *Public Prosecutor v. Ang Soon Huat* [1991] 1 MLJ 1 and had gone on to say:

The Court in the present case was in a similar predicament as it was not able to know whether the bulk of the suspected drug exhibits had been homogenised to ensure that the sample taken from the sample for the gas chromatography test was indeed representative of the whole, ie, the bulk. Hence, parts of the judgment in *Ang Soon Huat* have been given emphasis above to show the similarities in the methodology adopted for quantitative analysis of the heroin in that case as compared with the present case.

The learned deputy public prosecutor made a valiant attempt to equate the methodology adopted in the present case with that described in the High Court decision in *Public Prosecutor v. Roslim bin Harun* [1993] 3 CLJ 505 and approved by the Supreme Court in *Roslim bin Harun v. Public Prosecutor* [1994] 2 CLJ 486.

With respect, the Court was unable to agree with him. In *Roslim bin Harun*, the subject-matter of the charge was cannabis, which is a plant material. There the chemist examined physically and microscopically every roll of the 2,700 rolls of the plant material and found them to be of the genus cannabis. This was confirmed upon qualitative chemical tests carried out on random

representative samples. However, cannabis in this form is quite different from heroin in granular or powder form where there would be impurities in the bulk as well as in the sample taken from the bulk.

In the present case, the qualitative analysis carried out to conclude that the suspected drug exhibits contained heroin was not disputed. What was in issue was the quantity of heroin involved. For example, the contents of the three basins seized from the apartment each weighed 2,655.0 grammes, 2697.7 grammes and 2691.7 grammes whereas, even according to the chemist with his questionable methodology adopted to attain homogeneity of the bulk, the heroin content of the bulk in those three basins was 186.0 grammes, 166.3 grammes and 131.5 grammes respectively. This clearly showed that the heroin content comprised in the bulk in each basin was well below l0% which meant that more than 90% of the contents contained impurities. However, this conclusion of the heroin content was suspect because of the infirmity in the methodology adopted to homogenise the bulk before taking samples therefrom.

In the light of this patent weakness in the case for the prosecution, the Court was constrained to give the benefit of the doubt to the defence and it therefore reduced the charge accordingly.

In the light of these findings, we were mystified by the rejection of the chemist's evidence by the learned trial Judge and could not agree with him that the chemist had not complied with the provisions of the Act in conducting the chemical analysis on the drugs recovered.

In a similar situation, the Supreme Court in *Public Prosecutor v. Lam Sam* [1991] 3 MLJ 426 held:

(1) In regard to the evidence of the chemist, unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as *prima facie* evidence. As long as the evidence is credible, there is no necessity for the chemist to show in detail what he did in his laboratory. The evidence of the chemist in this case was more than sufficient as basis to call for the defence, granted that all the other ingredients of the offence had been successfully proved

(2) The doubt entertained by the learned Judge in this case was not arrived at on reasonable or rational grounds and the test he applied to the evidence of the chemist on the question of the weight of the drugs was a misdirection.

(3) The appeal should be allowed and the case remitted to the learned Judge to call for the defence.

We, therefore, ruled that the learned trial Judge was in error here especially when he had specified the same amount of drugs in the amended charge as that appearing in the original charge, and after having concluded that the

prosecution's case was overwhelming and that the drug involved, pursuant to the chemical analysis, was heroin.

We had allowed the appeal and directed that the defence of both respondents be called by the same trial Judge on the original charge and to be disposed of within three months from that order. Since the second respondent has already completed his imprisonment term, we directed the prosecution to take action, as regards the order of committal against him, for the purpose of the continued hearing.

It is relevant for us to state another point raised by learned Counsel for the respondents and that is whether the prosecution can appeal against conviction in a matter where the respondents had pleaded guilty to an amended charge in which case the appeal should only be against sentence as provided for under s. 305 of the Criminal Procedure Code (hereinafter 'the CPC') which reads:

> When an accused person has pleaded guilty and been convicted by a Magistrate on such plea, there shall be no appeal except as to the extent or legality of the sentence.

This, however, in view of s. 303A of the CPC as well, only applies to proceedings in a Sessions Court and a Magistrate's Court.

Section 50 of the Courts of Judicature Act 1964 states that we have jurisdiction to hear and determine any appeal against any decision made by the High Court in the exercise of its original jurisdiction and in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court and "decision" under s. 3 of that Act includes a judgment, sentence or order.

At first blush, we were quite taken up by what we considered was a novel point but upon reading the relevant provisions, we found the argument totally devoid of merit as the decision appealed against was actually the reduction of the charge which certainly was an order, which is appealable, and the plea of guilty by both the respondents to the reduced charge was only a consequence of that order.

Reported by WA Sharif